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February 1, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Via HAND DELIVERY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B204
Washington, D.C. 20554

**Re: Reply to Opposition to Application for Review
MM Docket No. 90-189**

Dear Ms. Salas:

Transmitted herewith is the original and four copies of the Reply to Opposition to Application for Review by Nevada County Broadcasters, Inc., of the Memorandum Opinion and Order, DA 99-2453, released November 5, 1999, in the above-referenced docket.

Very Truly Yours,


James P. Riley
Jennifer Dine Wagner

Counsel for Nevada County Broadcasters, Inc.

Enclosures (5)

cc: Robert Hayne, Esq., Mass Media Bureau (w/Enclosure)
Roger J. Metzler, Jr., Esq. (w/Enclosure)

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

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In the Matter of

Amendment of Section 73.202(b),
Table of Allotments
FM Broadcast Stations
Farmington, Grass Valley, Jackson,
Linden, Placerville, and Fair Oaks,
California; Carson City and
Sun Valley, Nevada

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MM Docket No. 90-189 FEB 01 2000

RM-6904
FEDERAL COMMUNICATIONS COMMISSION
RM-7114 OFFICE OF THE SECRETARY
RM-7186
RM-7298

To: The Commission

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

1. Nevada County Broadcasters, Inc. ("Nevada County"), licensee of radio station KNCO-FM, Grass Valley, California, by counsel, hereby replies to the Opposition filed against its Application for Review by Gold Country Communications, Inc. ("Gold Country"), licensee of KNGT(FM), Jackson, California, on January 7, 2000.¹ In its Application for Review, Nevada County requests that the Commission review the decision by the Chief of the Allocations Branch in Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, Memorandum Opinion & Order, DA 99-2453, MM Docket No. 90-189 (released November 5, 1999). In support of Nevada County's Reply to Opposition to Application for Review, the following is shown:

¹ This Reply to Opposition to Application for Review is timely filed pursuant to extensions of time consented to by Gold Country. See motions for extension of time filed January 19, 2000 and January 28, 2000.

2. **Background.** In the First Report and Order in this proceeding, released September 12, 1995, the Chief of the Allocations Branch allotted Channel 232A to Farmington, California, and upgraded Nevada County's station, KNCO-FM, to specify operation on Channel 232B1. The First Report and Order in part resolved multiple petitions for rulemaking that were either mutually exclusive or in some manner interrelated. The First Report and Order rejected a conflicting proposal in which Gold Country would have upgraded from Channel 232A to Channel 232B1. The First Report and Order deleted Channel 232A from Jackson and allotted Channel 259A to Jackson for use by KNGT(FM).

3. Gold Country filed a Petition for Reconsideration against the First Report and Order, and a post-deadline "Supplement" to its petition. The Allocations Branch released a Memorandum Opinion and Order on November 5, 1999, setting aside its decision in the First Report and Order based on the argument by Gold Country, first advanced in its supplemental filing, that the allotments in the Report and Order would cause "significant interference" to KNGT(FM) from co-channel superstation KFRC-FM.

4. In its Application for Review filed December 6, 1999, Nevada County enumerated the many procedural and technical errors incorporated in Gold Country's Supplemental Filing to its Petition for Reconsideration, and the findings by the Allocations Branch in reliance on Gold Country's Supplemental Filing, warranting reversal of the November 5, 1999, decision. Nevada County showed that the engineering study upon which the Commission based its decision to set aside the First Report and Order was seriously flawed because it failed to distinguish between interference areas and overlap areas.

5. Interference vs. Overlap. Nevada County showed in its Application for Review that the engineering statement that Gold Country submitted to the Commission, which the Commission endorsed and relied upon in setting aside its initial allocation, failed to make the critical distinction between interference and contour overlap. Gold Country failed to address Nevada County's showing in the text of its Opposition to Application for Review. However, the pleading's silence on the issue is countered by the engineering statement prepared by Gold Country's consultant and filed with Gold Country's Opposition. Gold Country's engineering submission shows both areas of interference and areas of overlap, and shows that the interference areas, as now calculated and depicted by Gold Country, make up only a small portion of the total overlap area.

6. The engineering exhibits accompanying the Opposition are absent any population numbers for the interference areas. The text of the Opposition cites the population numbers that are provided in the Commission's decision setting aside the initial allotments: 25,138 people in an overlap area of 1,107 kilometers. See Memorandum Opinion and Order at para. 8. However, the Opposition wrongly defines 25,138 as the population of the predicted interference area. In fact, 25,138 is the population of the entire overlap area. Gold Country's engineering exhibits show that interference is not predicted in the entire overlap area, but only in small areas within the overlap area. Therefore, the population for the entire overlap area differs significantly from the population in the smaller areas receiving interference. Nevada County's study of the population in the overlap area shows that only 4,234 people could receive interference. See Statement of William J. Getz in Support of an Application for Review in MM Docket 99-189 at 6 ("Getz Statement").

7. Because Gold Country acknowledges in its engineering exhibits that the interference areas are less than the overlap areas, it logically follows that the population affected is less in the interference areas than in the entire overlap area. Therefore, although Gold Country fails to address the interference vs. overlap area issue in the text of its Opposition, it concedes through its engineering exhibits that Nevada County's long-standing contention, that because of intervening terrain, the interference area is far less than the overlap area, is accurate. See Engineering Statement of Lawrence L. Morton, P.E. Supporting Opposition to Application for Review, Figures 1-7 (January 5, 2000); see also Statement of William J. Getz Supporting Reply to Opposition to an Application for Review in MM Docket 90-189 (January 31, 2000) (attached). As such, Gold Country concedes that there is no foundation for its original argument that interference would be significant. Without significant interference, the Commission must also recognize that, in this instance of a late-submitted argument, the extraordinary factual predicate necessary to require reconsideration "in the public interest" (See Section 1.106(c)(2)) does not exist. Moreover, Gold Country's explanation that it did not raise any interference issue until after the Commission issued the initial Report and Order because it thought it could rely on an "implied representation" from the Commission staff that the allotment would be clear of interference and overlap² should itself deprive Gold Country of any right to the exception provided by Section 1.106(c)(2). The Commission makes no such "implied representations." In fact, the "implied representation" argument is clearly unreasonable and obviously bogus. It is axiomatic that the Commission cannot absolutely guarantee that interference will not result in

² See Gold Country's Reply to Opposition to Petition for Reconsideration at 7 (May 28, 1996).

any allotment. Without the conclusion of substantial interference, there is no basis to set aside the allotments originally made.

8. Overlap Not Prohibited. Gold Country's and Nevada County's engineering exhibits both demonstrate that the predicted interference that would result to the service area of KNGT(FM) is far less than the overlap area that would result. Overlap between stations, standing alone, is not prohibited; in fact, the Commission has approved allotments for stations where contours will substantially overlap. See Getz Statement at 7-8 (citing Radio Broadcasting Services, Sun City, California, et. al, 54 Fed. Reg. 47,362 (1989) (FM service authorized where 100 percent of the protected service area and 100 percent of the population would receive prohibited overlap); Radio Broadcasting Services, Big Bear City, California, 52 Fed. Reg. 44,396 (1987) (67 percent of protected service area and 97.7 percent of population would receive prohibited overlap); Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments, 100 FCC 2d 1332, 1339 (1985) (75.5 percent of protected service area and 88.6 percent of population would receive prohibited overlap)).

9. The significant public interest justification for setting aside the initial allotments disappears when the population that may receive interference is not more than 4,324 people, rather than the 25,138 people in the entire overlap area as originally claimed by Gold Country. Moreover, the entire area of predicted interference to KNGT(FM) is served by at least five additional commercial FM stations. See Statement of William J. Getz in Support of an Opposition to a Supplemental Pleading to Petition for Reconsideration at 4. The dramatically smaller number of persons who would receive interference, all of whom have adequate other sources of FM service, does not rise to the level of significant public interest that would justify

setting aside the Allocation Branch's First Report and Order where, as here, the interference argument is raised only after the Report and Order is adopted and, even then, not until the filing of an untimely supplement to a petition for reconsideration.

10. Conclusion. Gold Country has acknowledged in the engineering exhibit of its Opposition to Application for Review that the interference area between KFRC-FM and KNGT(FM) is considerably smaller than the overlap area, and therefore considerably smaller than it originally claimed. As such, the number of people impacted is minimal, and dramatically fewer than the number that the Commission cited in its Order setting aside the initial allocation. There is, therefore, no significant public interest reason that supports setting aside the initial allotment.

11. For the foregoing reasons, Nevada County requests that the Commission review its Staff's decision, reverse the November 5, 1999, Memorandum Opinion & Order in this proceeding, and reinstate the correctly decided First Report and Order.

Respectfully submitted,



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February 1, 2000